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IN THE

Supreme Court of the United States

October Term, 1976

No. 76-643

JOSEPH B. SANCHEZ,

Petitioner,

vs.

THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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The Respondent respectfully submits herewith its reasons for opposing the Petition for Writ of Certiorari:

THE OPINION BELOW

The opinion of the United States Court of Appeals, Tenth Circuit, is reported at 538 F.2d 304.

THE QUESTION PRESENTED

In order to put the question presented for review in clearer perspective as to the considerations for review set forth in Supreme Court Rule 19, Respondent would restate the issue as follows:

In an action for personal injuries under the Federal Employers Liability Act, does the Tenth Circuit rule which allows a trial judge discretion to determine when an "un-

conscionable result" will occur unless evidence of tax consequences on projected future income is considered, differ in any material respect from the rule in other Circuits which allows the trial judge discretion to determine the threshold beyond the "lower or middle reach of the income scale" where the proportional impact of future income taxation is substantial before evidence of tax consequences is considered?

STATEMENT OF THE CASE

In order to more fully apprise this Court of the particular circumstances of this case which caused the trial judge to determine that evidence of tax consequences of the future income stream must be presented to the jury, Respondent offers this additional summary of the proceedings below.

Petitioner Sanchez was working as a laborer at the time of his injury. He had no special skills or training as to any other occupation. The various medical and rehabilitation experts who examined and treated the Petitioner testified that as a result of his injuries, he would be physically unable to continue as a laborer but they generally agreed that he would have a normal life expectancy and he could hold a number of sedentary type occupations without undue difficulty for the rest of his work expectancy.

At the trial, Petitioner's attorney called an economist to predict the loss of earnings which Petitioner would suffer as the result of his injury based on certain premises that (1) Petitioner would always have remained a laborer at the Railroad had he not been hurt; and (2) Petitioner would never be able to work in the future at any other occupation.

At an *in camera* hearing, it was adduced that the economist's prediction would contain an inflationary factor of 4.9% per annum. The economist indicated Petitioner would earn $68,000 in the year before he retired, and he would

average more than $28,800 per year over his work expectancy as a laborer for the Railroad.

The trial judge then informed Petitioner's attorney that he felt that such testimony would produce an unconscionable result unless the income tax consequences of the hypothetical income stream were taken into account. He pointed out to Petitioner's attorney that without the inflationary factor, the income stream of Petitioner would not approach a level where the tax consequences would be of import, and that he would not require evidence of the tax consequences except for the inflationary projections.

In his instructions to the jury, the trial judge gave no instruction limiting the jury's consideration to either gross or net future loss of earnings. No instruction was tendered or requested by Petitioner's counsel in respect to the subject of income taxation, and no objection was made to the lack of an instruction in this regard.

REASONS FOR DENYING PETITION

If one were to put Petitioner's argument into the form of a syllogism, it would appear to be as follows:

> *Major Premise* No Circuit, except the Tenth Circuit, allows introduction of evidence of the tax consequences on a future income stream except in "exceptional cases" where the plaintiff's income exceeds the middle range.
> *Minor Premise* The future income stream in the present case is not exceptional.
>
> *Conclusion* ∴ No Circuit, except the Tenth Circuit, would allow introduction of the tax consequences in the present case.

Unfortunately for Petitioner, it is a law of logic that if either the major or minor premise upon which the conclusion is founded is false, then the conclusion is also false.

Under the facts of the case here presented, both premises are false. The major premise is false because the Tenth Circuit is in harmony with all other circuits in only allowing introduction of future tax consequences in cases where failure to do so would produce an unconscionable result. The minor premise is false because, as the trial judge found, the present factual situation as brought about by the economist's inflationary predictions of a future income stream, is exceptional.

Petitioner has attempted to disguise the problems in his deductive reasoning process by averring that the *McWeeney* rule, as originally espoused in *McWeeney v. N.Y.N. H. & H. R.R. Co.*, 282 F.2d 34 (2 Cir. 1960) cert. den. 364 U.S. 870, 81 S.Ct. 115, is a substantive rule which devests the trial judge of any discretion (although it must be applied with "flexibility"). He asserts that a review of the other cases that have followed *McWeeney* show a $15,000 per annum floor for cases in which a trial judge can require evidence of the tax impact on a future income stream.

The *McWeeney* decision itself refutes this argument. No floor was ever intended. Judge Friendly anticipated that in each case, the trial judge must make a determination, which only he could make, as to when the tax consequences on a future income stream would have an impact on the jury. In his opinion, he stated:

> "There may be cases where failure to make some adjustment for the portion of a plaintiff's or decedent's earnings that would have been taken by income taxes would produce an improper result; but these are at the opposite end of the income spectrum from McWeeney's." (282 F.2d at 38)

> "To be sure a practice of refusing the instruction in most cases but requiring some adjustment in a few lacks precision and elegance; but we cannot disregard the practicalities of judicial administration and 'the law is untidy as life with which it deals.' Just where the line should be drawn must be left, as so much is, to the good sense of trial judges, whether acting with a jury or without."[1] (282 F.2d at 39).

Compare this language with the Tenth Circuit language in the case of *U. S. v. Sommers*, 351 F.2d 354 (10 Cir. 1965), reiterated and approved by Judge Lewis in his opinion in the present case:

> "Undoubtedly situations may arise in which the failure to take into account income tax liability would produce an unconscionable result, and conversely a similar result could be obtained if too great a deduction were applied. When dealing with such an imprecise and speculative subject, the best that can be hoped for is reasonableness. It is a determination best left to the exercise of sound discretion of the trial Judge, whether with or without a jury." (351 F.2d at 360) (cited in *Sanchez v. Denver & Rio Grande Western R. Co.*, 538 F.2d at 305.)

It is clear that Petitioner's argument is an exercise in semantics. The discretion of the trial judge in the Tenth Circuit (based on probability of an unconscionable result) is no different in application than the discretion under the *McWeeney* rule (based on decision as to whether the income stream is "exceptional").

Although, up to the present time, a dividing line near $15,000 per annum can be extrapolated from the results of the specific cases cited by Petitioner, a suggestion that all

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[1]In subsequent cases, the 2d Circuit reaffirms its position that there is no dividing line. In *Montellier v. U.S.*, 315 F.2d 180 (1963), it said at p. 186, "As we indicated in McWeeney, no precise line can be drawn." In *LeRoy v. Sabena Belgium World Airlines*, 344 F.2d 266 (1965), it said at p. 276, "We therefore conclude that McWeeney controls. That case did not lay down a flat rule, however. . . . Whether or not the district court was required to allow for the effect of income taxes in this case, we think it was at least a proper exercise of its discretion to do so."

trial judges have in the past, or must in the future, use that monetary figure as a "magic" dividing line is shallow.

Such reasoning would bring about multitudinous appellate litigation. Each aggrieved party in a future trial would attempt to show why the specific circumstances (such as a change in standards of living or inflation or tax structure) should cause a change in the $15,000 cut-off point. The decision as to when, where and why to allow evidence of the tax consequences of a future income tax stream must be left to the discretion of the trial judge.

CONCLUSION

The Petition for Writ of Certiorari should be denied. There is no conflict among the Circuits as contended. The discretionary rule as now followed in the Circuits is working well and provides justice with proper safeguards provided by appellate review if there is an abuse of discretion.

Respectfully submitted,

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